IN THE

MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
	)	
vs.	)	**No. SC82743**
	)	
	)	
BOBBY JOE MAYES,	)	
	)	
Appellant.	)	

Appeal to the MISSOURI SUPREME COURT

From the Circuit Court of PULASKI, COUNTY

Twenty-Fifth Judicial Circuit, The Honorable Douglas E. Long, Jr., JUDGE

APPELLANT'S REPLY BRIEF

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AUTHORITIES

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

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RULES:

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Jurisdiction

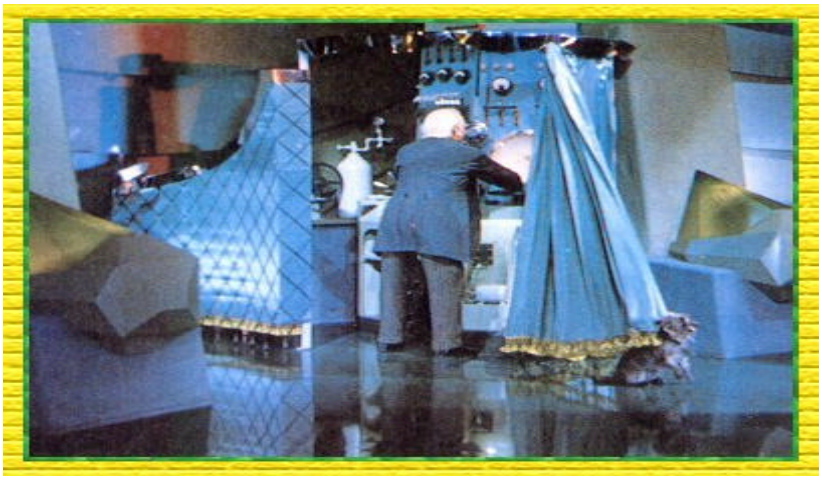
Because Bobby was sentenced to death, this Court has exclusive appellate jurisdiction. Mo.Const., Art.V, §3 (amended 1982).

Facts

Bobby incorporates the Facts from his Opening Brief. (App.Br. 13-23).

"Pay no attention to that man behind the curtain!"

The Wizard of Oz, L. Frank Baum.



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The Attorney General has ignored his duty to serve justice. *Berger v. U.S.*, 295 U.S. 78,88 (1935). Prosecuting Bobby at trial and on appeal, the Attorney General's Office seeks merely to win Bobby's convictions and execution. The State's mantra is: "Pay no attention to that man behind the curtain." Pay no attention to the Attorney General's actions and arguments at trial; pay no attention to information properly before this Court; pay no attention to the caselaw in Bobby's Opening Brief; pay no attention to this Court's precedent. With the "fair ascertainment of the truth" at stake, this Court must pay close attention to the man behind the curtain. *State v. Carter*, 641 S.W.2d 54,58 (Mo.banc1982).

Points

I.

The trial court plainly erred in entering judgment and sentence because the State won Bobby's convictions and death sentences through gross misconduct that deprived Bobby of due process, a fair trial before a fair and impartial jury and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,18(a),21. Ignoring her duty to serve justice and to elicit the truth, AAG Smith redacted material facts to hide the truth. She lied about Bobby being "accused" of stabbing a Kentucky inmate, knowing that investigators "*Cleared*" Bobby of any involvement. She lied that Bobby's question about buying a gun established deliberation, knowing the question related to a hypothetical robbery, references to which the court had excluded. Unless corrected, this gross misconduct will cause manifest injustice.

Giglio v. U.S, 405 U.S. 150 (1972);

Napue v. Illinois, 360 U.S. 264 (1959);

Elmer v. State, 724 A.2d 625 (Md.1999);

State v. Creason, 847 S.W.2d 482 (Mo.App.,W.D.1993);

U.S.Const., Amends. V,VI,VIII,XIV;

Mo.Const., Art. I, §§ 10,18(a),21;

Rules 4-3.1 and 55.03(b); and

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[1] http://home.cfl.rr.com/mmeara/page4m.htm

National Prosecution Standards, §77.2, at 211 (2dEd-1991).

II.

The trial court erred in sentencing Bobby to death without personally addressing him because this violated Bobby's rights to allocution, due process and freedom from cruel and unusual punishment. Rule 29.07(b)(1); U.S.Const., Amends. V,VIII,XIV; Mo.Const., Art. I, §10,21. Although the court let counsel state "any legal reason why sentence should not now be imposed," it did not let Bobby personally "to present to the court his plea in mitigation." Had the court addressed Bobby personally, a reasonable probability exists that it would not have sentenced Bobby to death as Bobby could have informed the court that AAG Smith won his death sentences by lying.

State v. Wise, 879 S.W.2d 494 (Mo.banc1994);

Hill v. U.S., 368 U.S. 424 (1962);

U.S.Const., Amends. V,VIII,XIV;

Mo.Const., Art. I, §10,21; and

Rule 29.07.

III.

The trial court abused its discretion in overruling Bobby's objection and letting the State present evidence that Bobby asked Michael James about buying a gun because such ruling deprived Bobby of due process, a fair trial and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),21. This evidence tended to prove no matter in issue; indeed, the question about buying a gun related to a hypothetical robbery, references to which the court properly excluded as an uncharged crime. This question about buying a gun was irrelevant to the charged murders so AAG Smith edited reality, falsely asserting that the gun proved deliberation.

State v. Brown, 939 S.W.2d 882 (Mo.banc1997);

Draper v. Louisville & N.R. Co., 156 S.W.2d 626 (Mo.1941);

U.S.Const., Amends. V,VI,VIII,XIV; and

Mo.Const., Art. I, §§10,18(a),21.

IV.

The trial court erred in refusing Bobby's request to give a "no-adverse-inference" instruction in penalty phase because such ruling denied Bobby due process, silence, a fair trial, freedom from cruel and unusual punishment and his privilege against self-incrimination. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,18(a),19,21. Bobby did not testify in penalty phase, and asked the court to give the "no-adverse-inference" instruction. The court sustained AAG Smith's objection to that instruction and refused to give it. Smith then referred the jury to Bobby's silence.

Carter v. Kentucky, 450 U.S. 288 (1981);

State v. Storey, 986 S.W.2d 462 (Mo.banc1999);

State v. Alexander, 875 S.W.2d 924 (Mo.App.,S.D.1994);

State v. Gleason, 813 S.W.2d 892 (Mo. App.,S.D.1991);

U.S.Const., Amends. V,VI,VIII,XIV;

Mo.Const., Art. I, §§ 10,18(a),19,21; and

MAI-CR3d 308.14.

VII.[2]

The trial court abused its discretion in (1) letting the State elicit the sexual nature of Bobby's pending trial and (2) refusing to reopen voir dire so Bobby could measure evidence's impact because these rulings denied Bobby due process, a fair trial, freedom from cruel and unusual punishment and to be tried only for the charged offenses. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,17,18(a),21. To show a motive, the State could elicit that Bobby had a criminal trial set for the day after the charged murders, but the sexual nature of that trial was not strictly necessary to show motive. The State did not use the sex trial merely to show motive but simply to inflame the jurors who Bobby could not voir dire for bias from the sexual "allegations" and "charges."

State v. Holbert, 416 S.W.2d 129 (Mo.1967);

State v. Collins, 669 S.W.2d 933 (Mo.banc1984);

State v. Mallett, 732 S.W.2d 525 (Mo.banc1987);

State v. Alexander, 875 S.W.2d 924 (Mo.App.,S.D.1994);

U.S.Const., Amends. V,VI,VIII,XIV;

Mo.Const., Art.I, §§ 10,17,18(a),21;

§§ 566.068,566.090,566.093,566.095; and

MAI-CR3d 310.12.

[2] Bobby maintains each of his original 18 Points/Arguments (App.Br.24-147), but finds it necessary to reply only to 7 of Respondent's Points/Arguments.

XIII.

The trial court abused its discretion in overruling Bobby's objection and letting Cora Wade testify about Sondra's hearsay statements because such ruling denied Bobby due process, confrontation, a fair trial and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I, §§ 10,18(a),21. Wade's testimony that Sondra said she had told Bobby she "wasn't intending to testify for [him]," but might if he signed the waiver of marital assets merely recounted past events. Her testimony that Sondra said Bobby had signed the waiver, but had not worked up the courage to tell him she was not testifying for him did not prove Sondra's state-of-mind. Since Bobby did not claim accident, suicide or self-defense, he did not put Sondra's state-of-mind in issue. The State used Wade's testimony to prove the truth of the matters asserted.

State v. Buckner, 810 S.W.2d 354 (Mo.App.,W.D.1991);

State v. Bell, 950 S.W.2d 482 (Mo.banc1997);

State v. White, 813 S.W.2d 862 (Mo.banc 1991);

U.S.Const., Amends. V,VI,VIII,XIV; and

Mo.Const., Art.I, §§ 10,18(a),21.

XV.

The trial court plainly erred in letting Dr. Hausenstein testify that Bobby offered no exculpatory explanation for the marks on his hands because such action denied Bobby due process, silence, counsel and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,18(a),19,21. Police made Dr. Hausenstein their agent to investigate marks on Bobby's hands, and did so without Bobby's attorney, Fred Martin, being present. Martin was defending Bobby on pending "sex charges," set for trial the next day. That sex case gave the State "one possible" motive and two potential aggravators for these murders, thus making Bobby's right to counsel in the sex and murder cases so inextricably intertwined that it could not be severed. If left uncorrected, this error will cause manifest injustice.

McNeil v. Wisconsin, 501 U.S. 171 (1991);

Texas v. Cobb, 121 S.Ct.1335 (2001);

Oregon v. Haas, 420 U.S. 714 (1975);

Blockberger v. U.S., 284 U.S. 299 (1932);

U.S.Const., Amends. V,VI,VIII,XIV; and

Mo.Const., Art. I, §§ 10,18(a),19,21.

Argument

I.

The trial court plainly erred in entering judgment and sentence because the State won Bobby's convictions and death sentences through gross misconduct that deprived Bobby of due process, a fair trial before a fair and impartial jury and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,18(a),21. Ignoring her duty to serve justice and to elicit the truth, AAG Smith redacted material facts to hide the truth. She lied about Bobby being "accused" of stabbing a Kentucky inmate, knowing that investigators "*Cleared*" Bobby of any involvement. She lied that Bobby's question about buying a gun established deliberation, knowing the question related to an hypothetical robbery, references to which the court had excluded. Unless corrected, this gross misconduct will cause manifest injustice.

Conspicuously absent from Respondent's Brief is any mention of the cases on which Bobby relied in his Opening Brief (Resp.Br.39-48). There is no mention of *Giglio v. U.S*, 405 U.S. 150 (1972) – *see* App.Br.54-55,59; *Napue v. Illinois*, 360 U.S. 264 (1959) – *see* App.Br.54,57,59; *Elmer v. State*, 724 A.2d 625 (Md.1999) – *see* App.Br. 57,59; or *Davis v. Zant*, 36 F.3d 1538 (11th Cir.1994) – *see* App.Br.59-60. Even when describing the applicable test, Respondent borrows from the generic category of prosecutorial misconduct, explaining that the question is not "whether the prosecutor is culpable; [but] … whether appellant received a fair trial." (Resp.Br.40, *citing State v.*

Williams, 922 S.W.2d 845,851 (Mo.App.,E.D.1996)("a prosecutor and police detective allegedly deter[ed] a defendant from testifying in surrebuttal.").

Respondent is generally correct – his coworker's culpability does not *ipso facto* require reversal. But the *specific* test, here, is whether a "reasonable likelihood" exists that the lies at issue "could have affected the jury's verdicts." (App.Br.55, *citing Giglio*, 405 U.S. at153; *Napue*, 360 U.S. at271). To ignore *Giglio* and *Napue* does a disservice. As Bobby fully discussed, AAG Smith "deliberately distorted the facts to mislead and prejudice Bobby's jury." (App.Br.60). A "reasonable likelihood" exists that her tactics affected the jury's verdicts. This Court must reverse.

AAG Smith's tactics affected the jury's penalty verdict

Bobby's Point Relied On alleges that "[AAG Smith] lied about Bobby being 'accused' of stabbing a Kentucky inmate, knowing that the investigators '*Cleared*' Bobby of any involvement." (App.Br.24,54). Respondent rewrites Bobby's claim, framing it as "alleg[ing] prosecutorial misconduct during the questioning of…Dr. Nelda Ferguson (about appellant's prison incident *reports*.)" (Resp.Br.20,39)(added). Respondent then "responds" that the *incident reports* were properly used "to test [Ferguson's] credibility and to test the validity and weight of her opinion." (Resp.Br.46, *citing State v. Smith*, 32 S.W.3d 532,550 (Mo.banc2000)). This is irrelevant to the issue Bobby raised. Bobby has not challenged whether AAG Smith could impeach Dr. Ferguson's opinion with those incident reports.

Bobby's claim is much narrower. He challenges *only* the propriety of AAG Smith falsely "accus[ing]" him of stabbing a fellow inmate. Respondent first claims: "The

incident report is not part of the record on appeal, and it was never introduced at trial as an exhibit." (Resp.Br.46). He asks this Court to ignore the Appendix to Bobby's Opening Brief; but that consists only of Bobby's motion to reverse and remand, which is properly contained in this Court's file. This Court considered that motion. Ignoring it now would simply subvert the truth.

Next, Respondent asserts, "[T]here is nothing in the record to assure this [C]ourt that the incident report included in appellant's appendix is the report that *the prosecutor* referred to during cross-examination." (Resp.Br.47)(added). What? If "the prosecutor" wasn't referring to this report, to what was she referring? Respondent cannot simply say this and move on. He must have a good faith basis for believing this is not the right report. Rules 4-3.1 and 55.03(b). "The [S]tate [has] made no explanation to the court or made any effort to show that it had a reasonable basis to believe [Bobby] was responsible for [this act]." *State v. Creason,* 847 S.W.2d 482, (Mo.App.,W.D.1993). To undersigned counsel's knowledge, *this* incident report is the *only* incident report referencing a stabbing. "The prosecutor" is *Respondent's* coworker. *His* file was *her* file. If Respondent knows of a different report referencing an actual stabbing committed by Bobby, he should produce it. The truth is no such report exists or AAG Smith would have asked Dr. Ferguson whether she considered that Bobby had stabbed an inmate. She did not because Bobby did not!

Finally, Respondent asserts, "The prosecutor *correctly phrased* her question by asking whether Ferguson knew that appellant had been 'accused' – *merely accused* – of stabbing another inmate." (Resp.Br.47)(added). Such semantics are made easier by

ignoring the cases on which Bobby earlier relied. The State cannot "ask a question which *implies the existence of a factual predicate* which [s]he knows to be untrue." (App.Br. 57, *quoting Elmer*, 724 A.2d at 631, *quoting National Prosecution Standards*, §77.2, at 211 (2dEd-1991)(emphasis in Opening Brief). This is because evidence that a defendant is accused of a crime is equivalent to evidence that he committed it. *See State v. Hornbuckle*, 769 S.W.2d 89,96 (Mo.banc1989). The accusation is only relevant if true.

According to Respondent, the prosecutor properly sought to show that Dr. Ferguson overlooked evidence that contradicted her conclusion that Bobby would fare well in prison if he received medication (Resp.Br.46). Whoa! How does this *unfounded accusation* contradict Dr. Ferguson's opinion? How is it evidence of Bobby's "prior failures in prison"? The *accusation* only contradicts Dr. Ferguson's opinion and shows Bobby's failure *if* Bobby stabbed another inmate. And he didn't!

AAG Smith's tactics affected the jury's guilt verdict

AAG Smith rearranged Bobby's conversation with Michael James to create the illusion that Bobby asked about a gun *because of* problems with his wife (App.Br.58, *citing* Tr.1231-1232). This illusion exists only "in the fertile fancy of [the] public prosecutor." *See State v. Willard*, 192 S.W. 437,440 (Mo.1917). The conversation developed quite differently (*See* App.Br.58), yet, Respondent adopts this contorted sequence as fact and claims his coworker's action was "entirely proper" (Resp.Br.11,44). How can it be "entirely proper" to change the sequence of events so as to create a parallel universe? A criminal trial is supposed to be a search for the truth – not an episode of the *Twilight Zone*. *State v. Carter*, 641 S.W.2d 54,58 (Mo.banc1982). A lie is a lie, and the

State must correct the lie and present the truth (*See* App.Br.57, *citing Napue*, 360 U.S. at269-270).

Rather than correcting its lie, the State shifts the blame for this contortion to Bobby for objecting to the improper evidence (Resp.Br.42). How can Bobby be blamed because the trial court agreed that the hypothetical robbery was irrelevant and prejudicial? *See also* Point III. The State's logic would let it rearrange facts and create an illusion – more incriminating than reality – any time the trial court sustains a defense objection and excludes evidence. That cannot be.

A reasonable likelihood exists that AAG Smith's tactics affected the verdicts

As Bobby pointed out in his Opening Brief, *Elmer, supra* and *Davis, supra*, are directly on point (App.Br.59-60). Respondent makes no effort to distinguish them, opting, instead, to ignore them (Resp.Br.39-48). *Elmer* and *Davis* do not cease to exist simply because the State pays no attention to them. "[The State] intentionally painted for the jury a distorted picture of the realities of this case in order to secure a conviction [and death sentences.]" *Davis*, 36 F.3d at1549. This Court must reverse Bobby's convictions and sentences.

II.

The trial court erred in sentencing Bobby to death without personally addressing him because this violated Bobby's rights to allocution, due process and freedom from cruel and unusual punishment. Rule 29.07(b)(1); U.S.Const., Amends. V,VIII,XIV; Mo.Const., Art. I, §10,21. Although the court let counsel state "any legal reason why sentence should not now be imposed," it did not let Bobby personally "to present to the court his plea in mitigation." Had the court addressed Bobby personally, a reasonable probability exists that it would not have sentenced Bobby to death as Bobby could have informed the court that AAG Smith won his death sentences by lying.

Bobby's claim is simple: The trial court let *defense counsel* show legal cause why Bobby should not be sentenced, but affirmatively denied *Bobby* that chance (App.Br. 26,61-64). Unfortunately, the disposition of this point hinges on the meaning and placement of pronouns:

Respondent rewrites Bobby's claim as alleging "that the trial court denied *his* affirmative request to personally [sic] address the court at sentencing." (Resp.Br.49, *citing* App.Br.63)(added)(footnote omitted). Respondent then notes that *Bobby* made no such request (Resp.Br.50). Indeed, Bobby didn't. But Bobby never claimed that he did (App.Br.61-64). Bobby never personally addressed the court before being sentenced (Tr. 2037-2075). That's the error! Respondent cannot simply add a pronoun to defeat Bobby's substantial claim of error.

Bobby argued that "[t]he court affirmatively denied Bobby [allocution]." (App.Br.63). It did. AAG Smith asked, "[W]as there going to be any allocution granted to the Defendant?" Respondent does not try to argue that his coworker's inquiry was not an affirmative request that Bobby be allowed to speak for himself – as was Bobby's right. Rather, Respondent simply ignores his coworker's inquiry. This Court must closely heed AAG Smith's question and the court's response.

AAG Smith attended the sentencing hearing, and she did not interpret the court's statements as being addressed to Bobby. The court asked, "The Defendant – does *he* have any legal cause in this – on this count?" (Resp.Br.50, *citing* Tr.2074)(added). Clearly, the court did not address *Bobby*. Had it done so, it would have used the pronoun "you," not "he." Even in the most informal use of English, one does not address another person using "he." For example, if the court wanted to know if the jurors needed a recess, would it ask, "Jurors – do they need a recess"? Certainly not. The trial court affirmatively refused the State's attempt to offer *Bobby* allocution. Now, the State ignores the effort it made at sentencing and asks this Court do the same.

As discussed in Bobby's Opening Brief, counsel's statements on the new trial motion do not obviate the court's duty to offer *the defendant* allocution. (App.Br.62, *comparing* Rules 29.07(a)(2) and 29.07(b)(1)). This Court and the United States Supreme Court recognize that affirmatively denying a defendant allocution may be unconstitutional. *State v. Wise,* 879 S.W.2d 494, 516 (Mo.banc1994); *Hill v. U.S.*, 368 U.S. 424, 428 (1962). In *Hill*, the Court added that the Constitution might be violated if the lack of allocution left the trial court misinformed or uninformed or the defendant

alleged that he would have had something material to say. 368 U.S. at429. Bobby's trial court was misinformed and Bobby would have had something material to say. Nonetheless, Respondent creates a tautology to put this claim beyond this Court's reach, complaining that no trial record exists. But none ever will when allocution is denied – that is the error. If there were such a record, the trial court would not have been misinformed!

The State misinformed the trial court. It successfully portrayed Bobby as a man who views human beings as objects and stabs fellow inmates (Tr. 1920-1921,1928, 2005). Had the court addressed *Bobby*, Bobby would have had something material to say: The State lied to paint Bobby as a threat in prison, and the opposite is true. The Kentucky investigators "Cleared" Bobby after investigating the stabbing incident of which Respondent so carelessly accused Bobby. Not only did Bobby not stab an inmate, but, in fact, he saved the lives of two guards (App.Br. A18-A21).

Respondent asks this Court to ignore what Bobby would have said had the court granted him allocution (Resp.Br.51,n.9). This would require ignoring *Hill,* which noted "there [was] no claim that the defendant would have had anything at all to say if he had been formally invited to speak" *Id.* For Bobby to make that claim, he must provide this Court with some factual basis – unless Respondent believes that bare assertions by counsel would suffice to make a constitutional claim under *Hill*. Either way, Bobby has met his burden, and this Court must vacate his sentences and remand for resentencing with allocution for *Bobby*.

III.

The trial court abused its discretion in overruling Bobby's objection and letting the State present evidence that Bobby asked Michael James about buying a gun because such ruling deprived Bobby of due process, a fair trial and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),21. This evidence tended to prove no matter in issue; indeed, the question about buying a gun related to a hypothetical robbery, references to which the court properly excluded as an uncharged crime. This question about buying a gun was irrelevant to the charged murders so AAG Smith edited reality, falsely asserting that the gun proved deliberation.

Bobby asked Michael James "where he could buy a gun" so he could rob Donnie Storm. Bobby never robbed Storm. The trial court agreed that evidence of that hypothetical robbery would create undue prejudice, and the court excluded any mention of it (Tr.1217-1218). Inexplicably, the court simultaneously admitted the question about buying a gun to commit that robbery. Contrary to Respondent's spin, letting the State dissect the gun from the robbery *was* "'clearly against the logic and circumstances before the court and [wa]s so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration[.]"' (Resp.Br.52, *quoting State v. Brown*, 939 S.W.2d 882,883 (Mo.banc1997).

Respondent asserts that "the prosecutor *might have known* that appellant asked about the gun in connection with a 'hypothetical robbery,' but the prosecutor was free to interpret appellant's request for a gun in any reasonable manner." (Resp.Br.52)(added).

Might have known? Is Respondent suggesting that AAG Smith *did not know* the contents of her own discovery? Pay no attention to the March 22, 1999 letter from AAG Smith's investigator – writing under Attorney General Nixon's name (Supp.L.F.2; Reply at A-2). That letter provided the defense with Officer Johnson's report detailing his phone interview of Michael James. *Id.* That phone interview unequivocally links the question about buying a gun to the hypothetical robbery (App.Br.A-32). Respondent, who also writes under Nixon's name, *cannot* simply create the illusion that his coworker may not have known the truth. If she didn't, it's only because she ignored *her* discovery!

AAG Smith knew the context of the question about a gun; she simply paid no attention to it. Instead, she twisted it, arguing, "[Bobby] was at [Michael James'] father's store complaining about problems with his wife and looking for a gun. That's premeditation. That's *deliberation*." (App.Br.67, *citing* Tr.1815)(emphasis in App.Br.). Without referencing this argument, Respondent half-heartedly defends his coworker's actions as "not unreasonable[3] for the prosecutor to conclude that appellant was looking for a gun for reasons other than those stated to Michael James"[4] (Resp.Br.53). Really? Contrary to Respondent's assertion, AAG Smith did not merely draw a conclusion.

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[3] Of course, just as "not guilty" does not equate with "innocent," neither does "not unreasonable" equate with "reasonable."

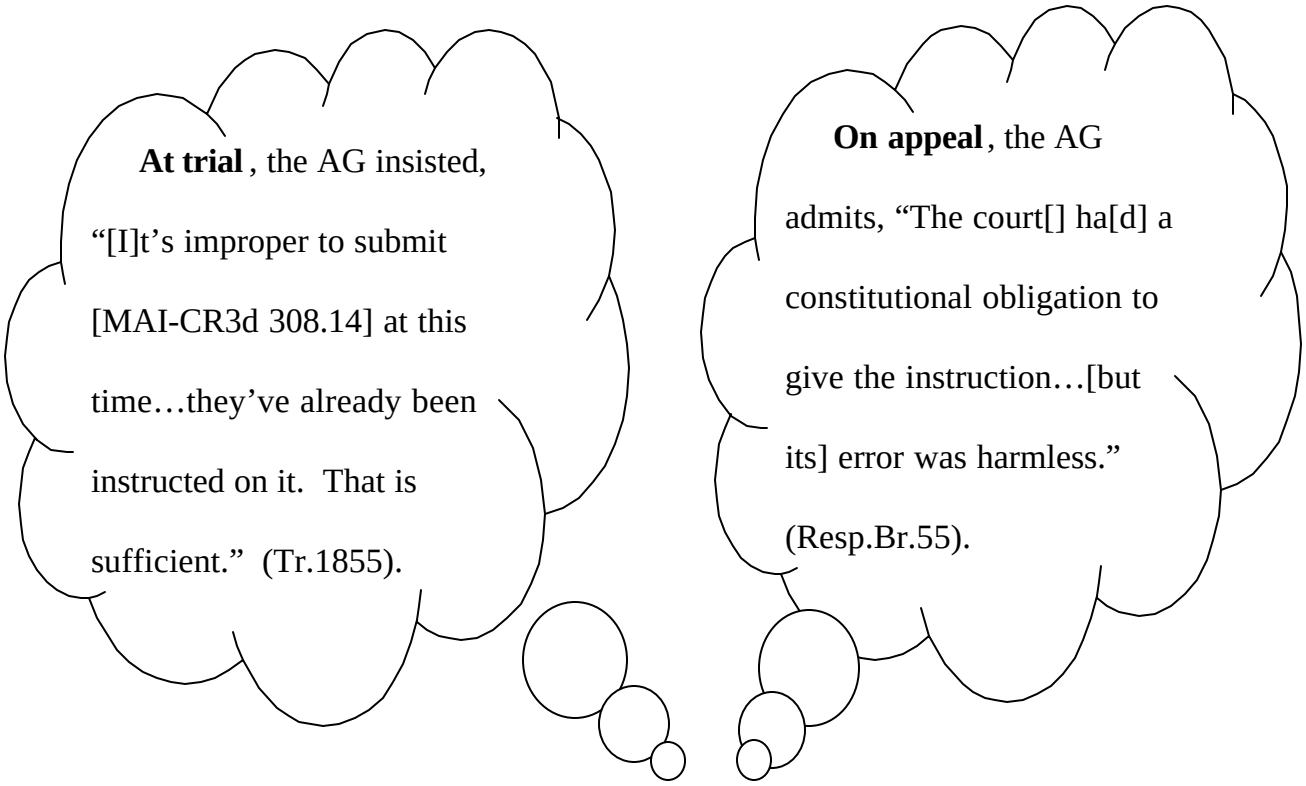
[4] Respondent contends, "There is no reason to believe that appellant would fully disclose his murderous intent to Michael James…." (Resp.Br.53). But we *are* supposed to believe that Bobby *would* fully disclose this to David Cook a few days later? That's handy.

Conclusions logically follow from facts. *Draper v. Louisville & N.R. Co.,* 156 S.W.2d 626,630 (Mo.1941). AAG Smith's argument created facts to replace reality and prejudice Bobby.

Respondent does not renew his complaint from Point I that "If appellant had wanted the jury to know more about the circumstances of his request about acquiring a gun, he could have let the prosecutor proceed without objection." (Resp.Br.42). Of course, the State cannot force Bobby to waive the rules of evidence just because the trial court makes an arbitrary ruling. Bobby objected both to the robbery and the gun inextricably tied to that robbery. The trial court sustained the former but overruled the latter. The trial court's arbitrary ruling created this error, not Bobby's objections! This Court must reverse Bobby's convictions and remand for a new trial.

IV.

The trial court erred in refusing Bobby's request to give a "no-adverse-inference" instruction in penalty phase because such ruling denied Bobby due process, silence, a fair trial, freedom from cruel and unusual punishment and his privilege against self-incrimination. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,18(a),19,21. Bobby did not testify in penalty phase, and asked the court to give the "no-adverse-inference" instruction. The court sustained AAG Smith's objection to that instruction and refused to give it. Smith then referred the jury to Bobby's silence.



How convenient! The Missouri Attorney General's Office gets to talk out of both sides of its mouth to avoid the constitutional error that it created. AAG Smith argued vigorously at trial *against* Bobby's request for the "no-adverse-inference" instruction

(Tr.1851-1859). Now, Respondent *confesses* that his coworker's ridiculous argument "exact[ed] an impermissible toll on [Bobby's] full and free exercise of [his Fifth Amendment] privilege." (Resp.Br.55-56, *citing Carter v. Kentucky*, 450 U.S. 288,305 (1981)). Respondent's lone hope is that this Court will ignore precedent.

Pay no attention that capital juries are **never** compelled to impose death – but may assess life even if aggravators outweigh mitigators. *State v. Storey*, 986 S.W.2d 462,464 (Mo.banc1999). "In light of this discretion, the prejudice against a defendant who invokes the privilege – prejudice which is 'inescapably impressed on the jury's consciousness' – is not purely speculative as the State suggests." *Id.* Respondent calls this holding a "remark" and contends the only fact impressed upon the jury is that "the defendant did not testify." (Resp.Br.57-58, *citing Carter*, 450 U.S. at301,n.18). Really? *Carter's* footnote 18 observes much more than Respondent would have this Court believe. It continues, "The layman's natural first suggestion would probably be that the resort to privilege in each instance is a *clear confession of the crime*." *Carter*, 450 U.S. at301,n.18 (added)(quotation omitted).

By ignoring the second half of footnote 18, Respondent claims that "this constitutional error is virtually always harmless" (Resp.Br.55) and "should almost never require reversal." (Resp.Br. 56). Forget that *Carter* ponders whether this error can *ever* be harmless. 450 U.S. at304. Respondent reaches its absurd conclusion by calling MAI-CR3d 308.14 an "optional instruction – 'optional' in the sense that it need not be given to the jury unless requested." (Resp.Br.57). Paying no attention to Bobby's repeated request for this instruction, Respondent extrapolates that, if this error were not always

harmless, the instruction would be required whether requested or not. According to Respondent, the "danger that the jury will give evidentiary weight to a defendant's failure to testify…is present in any case where the no-adverse-inference instruction is not given." (Resp.Br.58) (citation omitted). The same danger may be present, but this is simply a diversion because this instruction can be given *only* when defendants request it. To do otherwise would effectively compel reference to their silence. *Carter,* 450 U.S. at 307 (Stevens, J., concurring). Finally, unlike the hypothetical defendants who may choose not to "highlight the no-adverse-inference rule," *Bobby* chose to request the instruction! He didn't get the instruction because, as *Respondent* now admits, "[t]he trial court erred" in sustaining *Respondent's* objection to it (Resp.Br.55).

Respondent shares the trial court's duty to produce a fair trial. *State v. Tiedt,* 206 S.W.2d 524,526 (Mo.banc1947). Respondent wants this Court to excuse it from that duty. Respondent created an unfair trial where the jury could view Bobby's "resort to the privilege [as] a clear confession of crime." Now, Respondent seeks to avoid a new trial by posing a "heads we win; tails they lose" analysis that would eliminate the "no-adverse-inference" instruction altogether.

Respondent craftily creates a presumption of harmlessness by never mentioning the true standard of review. The approved instructions "contemplate religious observance" of the forms and corresponding notes on use. *State v. White*, 622 S.W.2d 939,943 (Mo.banc1982). Erroneously instructing the jury is presumed to prejudice the defendant "unless the contrary is clearly shown." *Id.* The Constitution requires Respondent to prove a constitutional error is harmless beyond a reasonable doubt.

Storey,supra at464, *citing Arizona v. Fulminante,* 499 U.S. 279 (1991). Thus, *Respondent* "must show 'that the defendant was not injured by the error as by showing that the jury disregarded or could not have been influenced by the evidence.'" *State v. Alexander*, 875 S.W.2d 924,929 (Mo.App.,S.D.1994), *citing State v. Degraffenreid,* 477 S.W.2d 57,64 (Mo.banc1972)(other citations omitted). Respondent, however, proposes a presumption of harmlessness that defendants would have to rebut. The State cannot keep pushing the envelope to avoid the consequences of errors it intentionally creates.

Respondent cannot show *beyond a reasonable doubt* that Bobby's jury disregarded or could not have been influenced by Bobby's failure to testify. It does not even try! Instead, paying no attention to precedent, it seeks to divert attention with wholly irrelevant factors (Resp.Br.59-63). Bobby's silence was "inescapably impressed on the jury's consciousness." Indeed, as *Carter's* footnote 18 observes, a layman's first thought is that silence equates to guilt. Even *with* the "no-adverse-inference" instruction it is impossible to prevent jurors from speculating about the defendant's silence. *Carter, supra* at303. Respondent cannot show beyond a reasonable doubt that *without* the instruction, Bobby's jury disregarded his silence.

As fully discussed in Bobby's Opening Brief, his case is far worse than *Storey*. Bobby's jury received the "no-adverse-inference" instruction when deliberating guilt but in penalty phase they were left to believe that all bets were off and that they could consider his silence as an aggravating circumstance warranting death (App.Br.70). This is especially true given Respondent's argument that "The Defendant already had his say on August 10th, 1998…" (App.Br.71, *citing* Tr.1204). Using "defendant" and "testify," *or*

their equivalents, constitutes reversible error. *State v. Gleason*, 813 S.W.2d 892,897 (Mo. App.,S.D.1991). "[H]is say" is certainly equivalent to "testify." After all, "[Bobby's say" on August 10, 1998 consisted of telling police he spent the afternoon of the murders fishing (Ap.Br.13, *citing* Tr.1138,1167-1168,1375-1376,1396-1397,1529, 1537). Respondent gained an unfair advantage by lodging an improper objection to a constitutionally required instruction and then highlighting the fact that Bobby talked to police on August 10, 1998, but didn't talk to the jury in April, 2000. This Court must reverse Bobby's death sentences and remand for a new penalty trial.

VII.

The trial court abused its discretion in (1) letting the State elicit the sexual nature of Bobby's pending trial and (2) refusing to reopen voir dire so Bobby could measure evidence's impact because these rulings denied Bobby due process, a fair trial, freedom from cruel and unusual punishment and to be tried only for the charged offenses. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,17,18(a),21. To show a motive, the State could elicit that Bobby had a criminal trial set for the day after the charged murders, but the sexual nature of that trial was not strictly necessary to show motive. The State did not use the sex trial merely to show motive but simply to inflame the jurors who Bobby could not voir dire for bias from the sexual "allegations" and "charges."

Uncharged crimes that *clearly* establish motive are admissible. *State v. Holbert*, 416 S.W.2d 129,132 (Mo.1967). Bobby has agreed that the State could present evidence of motive by contending that Sondra was refusing to testify for Bobby on his pending charges (App.Br.84-86). In so doing, Bobby relied on *State v. Collins*, 669 S.W.2d 933,936 (Mo.banc1984). Ignoring *Collins* altogether, Respondent asserts that Bobby had to "concede[]" this because of David Cook (Resp.Br.81). Hardly! As fully discussed in Point V of Bobby's Opening Brief, Cook is a professional crook who lied in a bid for leniency.

As the State recognized at trial, the pending "sexual charges" showed nothing more than "*one possible* motive" (Tr.934)(added). The mere *possibility* does clearly establish Bobby's motive – certainly not to the degree required to render the *sexual*

nature of the charges strictly necessary (App.Br.86-87, *citing Collins, supra*). Respondent chooses to ignore that *Collins* limits the use of uncharged crimes to that evidence which is of "strict necessity" so as to limit the danger of undue prejudice. "[T]he dangerous tendency and misleading probative force of this class of evidence require that its admission be subjected by the courts to *rigid scrutiny*." (App.Br.85, *citing Holbert,* 416 S.W.2d at 132)(emphasis in App.Br.).

According to Respondent, the sexual nature of the pending charges showed the "seriousness" of those charges, thereby "increasing the likelihood" that those charges were the motive (Resp.Br.81). How? As far as the jury knew, the pending "sexual charges" could have been misdemeanors. *See, e.g.*, §§ 566.068,566.090,566.093, 566.095. Not until penalty did the State tell the jury that the charges involved sodomy (*Cf.* Tr.1331-1334 and Tr.1985-1986). Respondent's "seriousness" argument is nothing but a smoke screen to cloud this Court's review.

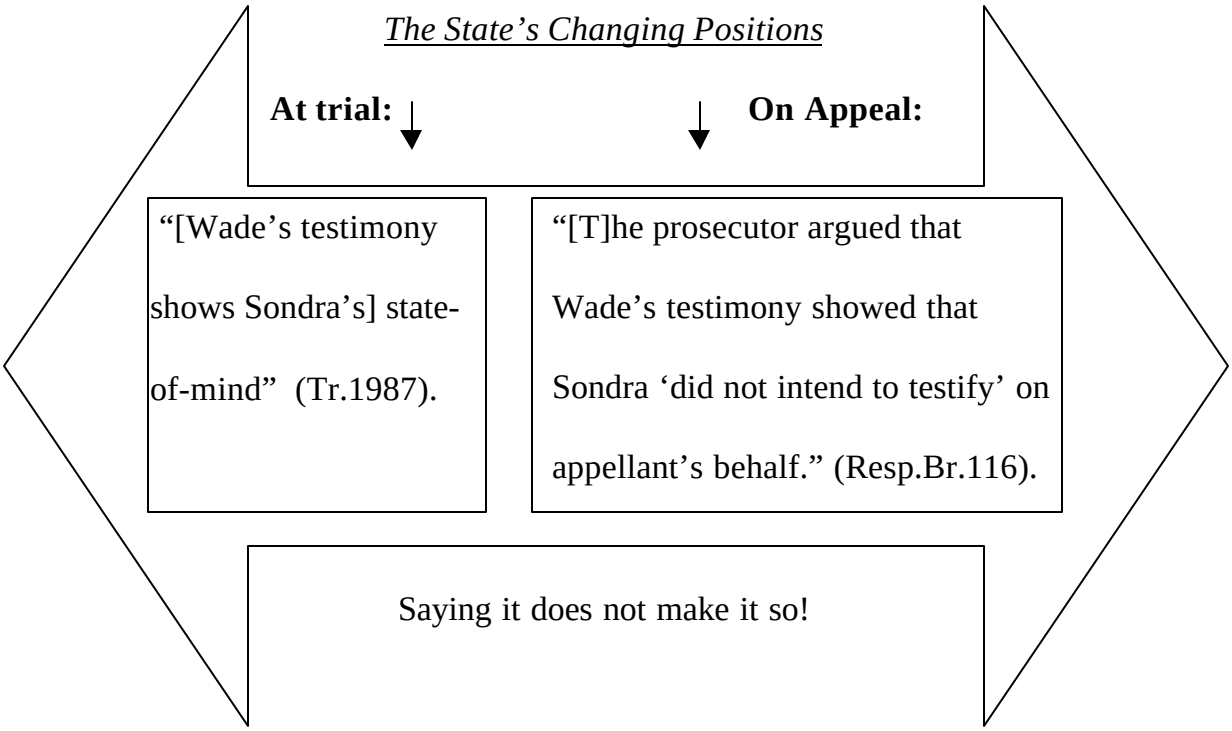
The existence of sex does not *ipso facto* render Bobby's pending charges strictly necessary – the standard Respondent never discusses. Respondent's parenthetical reliance on *State v. Mallett,* 732 S.W.2d 525,535 (Mo.banc1987) ignores the facts of *Mallett*. Mr. Mallett's robbery was strictly necessary to show motive because the circumstances of the robbery showed that he "knew he was wanted." *Id*. Also, Mr. Mallett claimed he shot the trooper accidentally. *Id.* 536. *Mallett* is useless, here. The *sexual* nature of Bobby's pending charges was not strictly necessary to show motive. Indeed, the State did not want the *sex* to show motive, or it would have asked that the jury be limited to considering it for proof of motive. (App.Br.87, *citing* MAI-CR3d 310.12).

The State simply wanted the sex! Disguising it as motive, the State then pushed the envelope and argued that the '*sexual* charges" rebutted Bobby's description of what he did the day of the murders (Tr.1835;Resp.Br.82).

Sex stirs feelings of abhorrence that must be avoided. *See State v. Alexander*, 875 S.W.2d 924,929 (Mo.App.,S.D.1994). *Rigid scrutiny* discloses that the sexual nature of Bobby's pending charges were not *strictly necessary*. This Court must reverse his convictions and remand for a new trial.

XIII.

The trial court abused its discretion in overruling Bobby's objection and letting Cora Wade testify about Sondra's hearsay statements because such ruling denied Bobby due process, confrontation, a fair trial and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I, §§ 10,18(a),21. Wade's testimony that Sondra said she had told Bobby she "wasn't intending to testify for [him]," but might if he signed the waiver of marital assets merely recounted past events. Her testimony that Sondra said Bobby had signed the waiver, but had not worked up the courage to tell him she was not testifying for him did not prove Sondra's state-of-mind. Since Bobby did not claim accident, suicide or self-defense, he did not put Sondra's state-of-mind in issue. The State used Wade's testimony to prove the truth of the matters asserted.



About four days before her death, Sondra allegedly told Cora Wade:

1. "she wasn't intending to testify for him and she had told him so;" and
2. "she might testify after—if he signed the waiver."

(Tr.1991). The day she died, Sondra allegedly told Wade:

3. "[Bobby] had signed [the waiver], but that she had not been able to work up the courage to tell him that she still wasn't going to testify for him."

(Tr.1992). After getting Wade's testimony admitted, purportedly to show Sondra's state-of-mind,[5] the State, now, ignores that exception. As to statements 1 and 2, Respondent summarily concedes they were "inadmissible hearsay" that "merely recited past events." (Resp.Br.116,118). Curative admissibility does not save the State from having to retry Bobby's penalty phase; Bobby did not open the door to this hearsay (*Cf.* Resp.Br.119 with App.Br. 124). The State, then, develops a new explanation for admitting statement 3: "[It] merely recounted Sondra's intentions just prior to the murders." (Resp.Br.116, *citing State v. Buckner*, 810 S.W.2d 354,358 (Mo.App.,W.D.1991)). This turns the hearsay rule on its head.

Quoting two consecutive sentences in *Buckner*, the State splices them with a gratuitous citation to *State v. Bell*, 950 S.w.2d 482 (Mo.banc1997), thereby lending

[5] Of course, the jury didn't know that Wade's testimony was limited to showing Sondra's state-of-mind (Tr.1990-1992). *Cf. State v. Parker*, 886 S.W.2d 908,925 (Mo.banc1994) ("The trial court admitted it only for state of mind, and so instructed the jury.").

Buckner credibility it does not deserve. *Buckner* has *never* been cited – save this Court's notation in *State v. White*, 813 S.W.2d 862,866 (Mo.banc 1991) that Buckner and White were codefendants. *Bell* neither cites *Buckner*, nor stands for the proposition implied by Respondent's citation. As fully discussed in Bobby's Opening Brief, *Bell, supra*, addresses the state-of-mind exception to hearsay and renders Wade's testimony inadmissible (App.Br.123).

Buckner is an aberration that must be strictly limited to its facts. Respondent does not discuss those facts, which are vastly different from those before this Court. There, Buckner, Wright (the victim) and Kinney (a codefendant) discussed a drug deal. *Buckner, supra* at357. Buckner wanted to buy two rocks of crack from Wright, and Wright "asked him if he wanted to get it right now." *Id.*(in original). Buckner replied that he had to pick up his girlfriend first, and Wright asked, "about how long is this going to take you." *Id.* (in original). When Buckner said it would take him about 45 minutes, Wright said, "45 minutes … so you still remember where I stay at." *Id*. (in original). The trial court admitted this "[o]nly to understand what [Buckner] said, in what context." *Id.* at358. The Western District held,

> It was not [Wright's] state of mind that was an ultimate issue…, but that of [Buckner]. The state of mind of [Wright] was relevant only to explain the motive that prompted him to be at home within 45 minutes of the earlier conversation with Buckner. The statements of Wright were circumstances to prove that state of mind, and his conduct then prompted by that state of mind was relevant to an ultimate issue in the litigation.

Id. Wright stated a present intent to be at home within 45 minutes to sell crack to Buckner.

Bobby's case is nothing like *Buckner*. Sondra's third statement declares *no* intention to take *any particular* action. It merely notes that, to that point, she had not worked up the courage to tell Bobby she wasn't going to testify for him. As Bobby fully discussed in his Opening Brief, it is impossible to discern what that statement meant, or what, if any, action, she took (App.Br. 123). Wade's testimony simply gave the State a vehicle through which to speculate. The State chose to use inadmissible hearsay, and not even *Buckner* saves it from that error. This Court must reverse and remand.

XV.

The trial court plainly erred in letting Dr. Hausenstein testify that Bobby offered no exculpatory explanation for the marks on his hands because such action denied Bobby due process, silence, counsel and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,18(a),19,21. Police made Dr. Hausenstein their agent to investigate marks on Bobby's hands, and did so without Bobby's attorney, Fred Martin, being present. Martin was defending Bobby on pending "sex charges," set for trial the next day. That sex case gave the State "one possible" motive and two potential aggravators for these murders, thus making Bobby's right to counsel in the sex and murder cases so inextricably intertwined that it could not be severed. If left uncorrected, this error will cause manifest injustice.

Our Constitutions provide counsel "to 'protec[t] the unaided layman at critical confrontations' with his expert adversary,' the government…." *McNeil v. Wisconsin*, 501 U.S. 171,177 (1991). This precludes the State from deliberately obtaining evidence from a suspect without counsel being present. *Id.* at175-176. Nonetheless, as fully discussed in Bobby's Opening Brief, police intentionally waited until Bobby's attorney left the jail to investigate the marks on Bobby's hands (*See* App.Br.130, *citing* Tr.1307-1308,1522,1789). Respondent tries to divert attention from this illegal contact, claiming, "The physical examination of appellant's hands was not an interrogation" (Resp.Br.131). Once the right to counsel has attached, the Constitutions forbid the State from getting *evidence* from suspects – not simply from interrogating them.

Since counsel did not object to this fundamental constitutional error, Bobby has sought plain error review (App.Br.48,129-134). To show the manifest injustice stemming from the State's illegal contact with Bobby without his attorney, Bobby pointed out that the State used Bobby's failure to volunteer an exculpatory explanation to Dr. Hausenstein as evidence against him (App.Br.133). Respondent characterizes this as an "afterthought" and "assumes" that Bobby is adding a Fifth Amendment[6] violation (Resp.Br.129). Respondent should not make such assumptions. Once the right to counsel has attached, the State cannot initiate contact with the defendant without counsel being present. If the State ignores this and elicits a confession, it cannot be used at trial. The State should not be able to end-run this rule by contacting a defendant without counsel and eliciting that he *failed* to offer an exculpatory statement.

Bobby's right to counsel had attached to this murder case because the murders were "inextricably intertwined" with Bobby's pending sodomy case (App.Br.131-133). When Bobby filed his Opening Brief, *Texas v. Cobb*, No.99-1702 had just been argued before the U.S. Supreme Court (App.Br.130,n.11). In the interim, as Respondent notes, the Court rejected the "inextricably intertwined" doctrine. *Texas v. Cobb*, 121 S.Ct.1335, 1341 (2001). *Cobb*, however, is the result of a bitterly divided Court, and this Court need not adhere to it.

[6] *See* Motion to Strike Respondent's Assertion that "At no time did appellant ever assert his right to remain silent…" (Resp.Br.131).

"[A] State is free *as a matter of its own law* to impose greater restrictions on police activity than those [the U.S. Supreme] Court holds to be necessary upon federal constitutional standards." *Oregon v. Haas*, 420 U.S. 714,719 (1975)(in original). This Court should find broader protection from overzealous police in Article I, § 18(a). Four Justices dissented in *Cobb*, noting "*virtually every lower court* in the United States to consider the issue" has concluded that the right to counsel attaches to "inextricably intertwined" criminal acts. *Cobb*, 121 S.Ct. at 1350 (Breyer, J., dissenting)(citations omitted)(emphasis added); *see also* (App.Br.130).

Allowing *Cobb* to limit the protection granted by the Missouri Constitution "will work havoc." *Id.* at1349. The majority in *Cobb* imported *Blockberger v. U.S.*, 284 U.S. 299 (1932) to define "offense" for purposes of the Sixth Amendment. *Cobb*, 121 S.Ct. at 1343. But, as Justice Breyer points out, this invites anomalous results: "the police could ask the individual charged with robbery about, say, the assault of the cashier not yet charged, or about any other uncharged offense (unless under *Blockberger's* definition it counts as the "same offense"), all *without notifying counsel*." *Id*. at 1348 (Breyer, J, dissenting)(in original). Recognizing that the right to counsel should attach to all "inextricably intertwined" offenses, *Cobb's* dissent and the overwhelming majority of lower courts provide the better analysis. This Court should find that the Missouri Constitution prohibits police-initiated contact regarding offenses "inextricably intertwined" with offenses to which the right to counsel has attached.

As fully discussed in Bobby's Opening Brief, the murders were "inextricably intertwined" with the pending sodomy case (App.Br. 131-133). Therefore, this Court must reverse Bobby's convictions and remand for a new trial.

Conclusion

This trial did not produce a fair ascertainment of the truth, and thus Bobby Joe Mayes respectfully requests the following relief from this Court:

New Trial:	Points I,III,V,VII,VIII,IX,X,XII,XIV,XV,
New Penalty Phase:	Points I,IV,VIII,XI,XII,XIII,XVI,XVII,XVIII
Allocution:	Point II
LWOP:	Points VI,XVIII

Respectfully Submitted,

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Certificate of Compliance and Service

I, Gary E. Brotherton, hereby certify that:

- ✓ The attached reply brief was written using Microsoft Word, Office2000 in Times New Roman size 13 point font. It complies with the limitations contained in this Court's Special Rule 1(b).
- ✓ According to Microsoft Word, the reply brief – excluding the cover page, the signature block, this Certification of Compliance and Service, and the appendix, contains 7,495 words. Counsel, however, is aware that Microsoft Word's Word Count feature failed to count 77 words. The reply brief actually contains 7,572 words, which does not exceed the 7,750 words (25% of 31,000) allowed for reply briefs.
- ✓ The floppy disk filed with this reply brief contains a complete copy of this reply brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated May 2, 2001. According to that program, the disks provided to this Court and to the Attorney General are virus-free.
- ✓ A true and correct copy of the attached brief and a floppy disk containing a copy of this brief mailed, postage prepaid this 14th day of May 2001, to Shaun J. Mackelprang, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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Gary E. Brotherton